BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JERRY T. DICKINSON	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,066,706
HENDRICK AUTOMOTIVE GROUP	)	
Respondent	)	
AND	)	
	)	
HARTFORD INSURANCE CO. OF THE MIDWEST	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) request review of the December 11, 2013, preliminary hearing Order entered by Administrative Law Judge (ALJ) Steven J. Howard.

APPEARANCES

Leah B. Burkhead, of Mission, Kansas, appeared for the claimant. Jeff S. Bloskey, of Overland Park, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has adopted the same stipulations and considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing from December 10, 2013, with exhibits attached and the documents of record filed with the Division.

ISSUES

The ALJ found claimant's history to be extremely credible and precise regarding his medical history and found claimant sustained accidental injury on June 19, 2013, the date he was advised his employment caused his current problems; claimant's employment is the prevailing factor and cause of his current problems and need for treatment and Dr.

Toby was authorized to provide any and all medical care necessary to relieve or cure the effects of the injury to claimant's upper extremities.

The respondent requests review of whether claimant provided timely notice pursuant to K.S.A. 44-520. Respondent argues claimant, as employee of its company, was required by statute to provide notice of injury within 20 days of either February 22, 2013, or 20 days from April 2, 2013, but failed to do so. Respondent contends claimant's brief comments to his supervisor's assistant on April 2, 2013, did not rise to the level of sufficient notice under the Act. Therefore, claimant's request for benefits should be denied.

Claimant argues the ALJ's Order should be affirmed.

The issues are as follows:

1. What is the date of accident?

2. Was timely notice provided?

FINDINGS OF FACT

Claimant began working for respondent in July 2011, as an auto body technician. Claimant is alleging injury to his upper extremities from the repetitive motion, drilling, hammering, using impact wrenches, pneumatic tools and electric tools, in the course of his employment with respondent. Claimant's job requires him to twist his upper extremities to perform gripping, pinching and other activities. Claimant works nine hours a day, five days a week. He is paid by production, so the faster he works, the more he earns.

Claimant acknowledges a prior upper extremity problem to the right elbow, in the 1980's, for which he had surgery. He denied having any numbness or tingling from that injury. He also denied any ongoing problems from that injury. Claimant claims that his diagnosis of bilateral carpal tunnel syndrome is due to his repetitive work duties for respondent. He reports his right upper extremity is a little worse than his left upper extremity. He testified it was roughly a year of working for respondent before he began to notice numbness and tingling in his upper extremities. He testified that the symptoms started with the right hand when he noticed tingling, numbness, itching, and decreased grip.

One day claimant was putting a fender on a car when his hand went numb and he dropped the air ratchet he was using. As claimant continued to work, his condition worsened and his symptoms came more frequently and rapidly. He testified that squeezing and gripping bother him more than drilling and air-chiseling. The symptoms in claimant's left hand began after he was diagnosed with carpal tunnel syndrome in the right wrist and he began to use the left upper extremity more to compensate. He then developed carpal tunnel syndrome in the left upper extremity. Claimant has continued to

work full duty the entire time. He has not been given any restrictions or put on modified duty.

On February 22, 2013, claimant met with his personal physician, Brian D. Cooke, M.D., of Associates In Family Care in Osawatomie, Kansas, for a recheck of his blood pressure. Claimant mentioned he had been having numbness and tingling in his right hand for a while. He was referred for an EMG, but was not given any restrictions or put on modified duty. Claimant was not told that his condition was related to his work and the subject did not come up.

Claimant met with James S. Applebaum, M.D., for an EMG on April 2, 2013, and was told that he had right upper extremity carpal tunnel syndrome and it was on the extreme side. Dr. Applebaum recommended claimant get a wrist splint and if there is no improvement, surgery would be the next option. Again, any indication of claimant's carpal tunnel syndrome being work-related was not contained in the report. Although, on cross-examination, claimant acknowledged he believed his right upper extremity problem at that time was work-related.

When claimant returned to work, after his appointment, he reported to the assistant body shop manager, Kelly, that he had been diagnosed with carpal tunnel syndrome. This was reported to Kelly, because Craig Scurlock, the body shop manager, was not available. Claimant did not ask for treatment and none was offered. Whether claimant's carpal tunnel was work-related was not discussed. Claimant continued to work full duty.

On June 19, 2013, claimant was sent to Corporate Care to seek a doctor regarding pain in his upper extremities and for a hernia he sustained on November 14, 2012. Claimant had reported the hernia injury, but had not been provided treatment. Claimant testified the reason he sought treatment was he finally had enough of the pain and went over Mr. Scurlock's head to Mr. Scurlock's supervisor, Bernie Smith, the service manager, to obtain treatment. This hernia injury is the subject of another appeal in Docket No. 1,066,707 and is not part of this litigation. Paperwork was completed, the insurance company was called and claimant was sent to be examined by Trent E. Knewtson, D.O., at Corporate Care on June 19, 2013. Claimant complained of pain and numbness in his right hand. Dr. Knewtson noted claimant had full range of motion without slowing, guarding or pain in his wrists. He had full range of motion in his hands without crepitus, guarding or pain; there was no abnormal catching, locking or slowing during the motion, and there was no tenderness, no scars, masses or deformities, and no muscular atrophy.

Dr. Knewtson diagnosed right carpal tunnel syndrome. His notes indicated that this was the first time claimant had been seen for the carpal tunnel syndrome injury. Claimant was allowed to return to work with no restrictions. It was determined that claimant's work was the predominate cause of the carpal tunnel syndrome. Claimant was asked when he first advised respondent that his upper extremity problems were work-related and he stated it was after his examination at Corporate Care.

Claimant testified the history taken at Corporate Care regarding his carpal tunnel syndrome was incorrect in that he had pain in his wrists for longer than 4 days and the pain was in both wrists, not just the right wrist. However, his focus was more on the right because he is right-handed, so he might not have mentioned his left hand and wrist at the Corporate Care appointment. Claimant was told at this appointment that the carpal tunnel syndrome was work-related. It was after returning from the Corporate Care appointment that claimant advised respondent his carpal tunnel syndrome was work related.[1]

Claimant testified that the first time his hand went numb was in June or July 2012, while he was working with a ratchet. He testified this was when he began to experience loss of grip and started dropping things. His symptoms continued to worsen as time went on. Claimant was involved in a car accident on September 11, 2013, but it did not involve his hands.

At the request of his attorney, claimant met with board certified occupational medicine specialist, Michael J. Poppa, D.O., on September 20, 2013, for an examination. Dr. Poppa noted claimant presented with two separate work-related injuries while in the employment of respondent. The injuries involved claimant's right and left fingers/hands/wrists/upper extremities and claimant had a hernia. Claimant reported to Dr. Poppa that the pain and symptoms in his hands, fingers and upper extremities impacted his activities of daily living.

Dr. Poppa examined claimant and found active and symmetrical reflexes in the upper extremities. Tinel's testing was symptomatic involving the right hand, with production of distal palmar median nerve paresthesias. Pinprick testing revealed no sensitivity loss involving the digits of either hand and claimant was able to oppose all digits of each hand to each palm. Hand grip on the right was difficult, secondary to pain. Claimant voiced complaints of pain on palpation overlying the dorsoradial aspect of the right distal forearm and wrist, consistent with tendonitis.

Dr. Poppa concluded claimant had not reached maximum medical improvement regarding the series of cumulative traumas culminating June 19, 2013, involving the bilateral upper extremities. He opined claimant's employment with respondent was the prevailing factor in causing claimant's injuries, need for medical treatment and disability. He felt claimant required a surgical consultation and treatment involving the right upper extremity. Median nerve impingement at the wrist was judged to be of a moderate degree of severity. He recommended an EMG/NCS of the left upper extremity and treatment for probable left carpal tunnel syndrome which he judged to be mild. Treatment of the left upper extremity should include non-steroidal anti-inflammatory medications and participation in physical therapy with modalities involving the left distal forearm and wrist. If this treatment failed, claimant would be a candidate for left carpal tunnel release.

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[1] P.H. Trans. at 26.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2012 Supp. 44-501b(a)(b)(c) states:

> (a) It is the intent of the legislature that the workers compensation act shall be liberally construed only for the purpose of bringing employers and employees within the provisions of the act. The provisions of the workers compensation act shall be applied impartially to both employers and employees in cases arising thereunder.
>
> (b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.
>
> (c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2012 Supp. 44-508(e) states:

> (e) "Repetitive trauma" refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. "Repetitive trauma" shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.
>
> In the case of injury by repetitive trauma, the date of injury shall be the earliest of:
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> (1) The date the employee, while employed for the employer against whom benefits are sought, is taken off work by a physician due to the diagnosed repetitive trauma;
> (2) the date the employee, while employed for the employer against whom benefits are sought, is placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma;
> (3) the date the employee, while employed for the employer against whom benefits are sought, is advised by a physician that the condition is work-related; or
> (4) the last day worked, if the employee no longer works for the employer against whom benefits are sought.
>
> In no case shall the date of accident be later than the last date worked.

Respondent contends claimant failed to provide timely notice of his series of repetitive trauma. In order for the timeliness of claimant's notice to be determined, the appropriate date of accident must first be determined. Respondent contends claimant's date of accident in this matter should either be February 22, 2013, or April 2, 2013.

Claimant's notice to respondent in June 2013, would not be timely for either date of accident, even if those dates are found to be appropriate. Claimant needed to provide notice within 20 days from seeking medical treatment for his injury by repetitive trauma or 30 days from the date of injury by repetitive trauma, whichever came first. The Board has interpreted the 20 days notice requirement as 20 days from the date claimant sought medical treatment for the repetitive trauma injury after the date of injury by repetitive trauma has been established under K.S.A. 2012 Supp. 44-508(e).[2]

Claimant's examination on February 22, 2013, with Dr. Cooke mentions claimant's employment with respondent, but there is no indication of the cause of claimant's carpal tunnel syndrome. Likewise, the EMG tests performed on April 2, 2013, display carpal tunnel syndrome, but the report makes no determination as to the cause of the condition. Pursuant to K.S.A. 2012 Supp. 44-508(e) neither date would qualify as the date of accident in this matter, as claimant had not been taken off work or placed on modified or restricted duty as the result of either examination. Additionally, claimant was not advised by either physician that his condition was work-related, and claimant continued in his employment with respondent. It was not until the examination on June 19, 2013, that claimant's carpal tunnel syndrome was determined to be due to claimant's employment with respondent. Thus, the June 19, 2013, date of accident is proper and is affirmed.

K.S.A. 2012 Supp. 44-520 states:

> (a) (1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:
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> (A) 30 calendar days from the date of accident or the date of injury by repetitive trauma;
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> (B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought; or
>
> (C) if the employee no longer works for the employer against whom benefits are being sought, 20 calendar days after the employee's last day of actual work for the employer.
> Notice may be given orally or in writing.
>
> (2) Where notice is provided orally, if the employer has designated an individual or department to whom notice must be given and such designation has been communicated in writing to the employee, notice to any other individual or

[2] *Shields v. Mid Continental Restoration*, No. 1,059,870, 2012 WL 4763702 (Kan. WCAB Sept. 19, 2012).

> department shall be insufficient under this section. If the employer has not designated an individual or department to whom notice must be given, notice must be provided to a supervisor or manager.
>
> (3) Where notice is provided in writing, notice must be sent to a supervisor or manager at the employee's principal location of employment. The burden shall be on the employee to prove that such notice was actually received by the employer.
>
> (4) The notice, whether provided orally or in writing, shall include the time, date, place, person injured and particulars of such injury. It must be apparent from the content of the notice that the employee is claiming benefits under the workers compensation act or has suffered a work-related injury.
>
> (b) The notice required by subsection (a) shall be waived if the employee proves that (1) the employer or the employer's duly authorized agent had actual knowledge of the injury; (2) the employer or the employer's duly authorized agent was unavailable to receive such notice within the applicable period as provided in paragraph (1) of subsection (a); or (3) the employee was physically unable to give such notice.
>
> (c) For the purposes of calculating the notice period proscribed in subsection (a), weekends shall be included.

Claimant advised respondent that his carpal tunnel syndrome was work-related after returning from the examination on June 19, 2013, with Corporate Care. With a date of accident found to be June 19, 2013, claimant's notice to respondent would have been timely, when provided upon his return from the June 19, 2013, appointment. The award of preliminary benefits by the ALJ is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[3] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2012 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed. Claimant suffered personal injury by repetitive trauma, with an accident date of June 19, 2013, and provided timely notice of that repetitive trauma to respondent.

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[3] K.S.A. 2012 Supp. 44-534a.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Steven J. Howard dated December 11, 2013, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of February, 2014.

_____
HONORABLE GARY M. KORTE
BOARD MEMBER

c: Leah B. Burkhead, Attorney for Claimant
lwheeler@markandburkhead.com

Jeff S. Bloskey, Attorney for Respondent and its Insurance Carrier
jbloskey@mgbp-law.com

Steven J. Howard, Administrative Law Judge